



DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 518

RIN 3141-AA72

Self-Regulation of Class II Gaming

AGENCY: National Indian Gaming Commission.

ACTION: Proposed rule.

SUMMARY: The National Indian Gaming Commission (NIGC) proposes to amend its regulations regarding self-regulation of Class II gaming under the Indian Gaming Regulatory Act. The proposed rule will amend the regulations to address an ambiguity in the petitioning process and clarify and expand the Office of Self-Regulation's (OSR) role once the Commission issues a certificate. Notably, the proposed rule: clarifies the NIGC may issue a final decision on issuing a certificate within 30 days instead of after 30 days; enumerates the OSR is the correct party to receive notifications of material changes from self-regulated tribes; clarifies the OSR will be the proponent of any case to revoke a certificate of self-regulation before the Commission; enables the OSR to obtain information from a self-regulated tribe; and clarifies that, in any revocation proceeding, the OSR has the burden to show just cause for the revocation and carry that burden by a preponderance of the evidence.

DATES: The agency must receive comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* information@nigc.gov
- *Fax:* (202) 632-7066.

- *Mail*: National Indian Gaming Commission, 1849 C Street NW, MS 1621, Washington, DC 20240.
- *Hand Delivery*: National Indian Gaming Commission, 90 K Street NE, Suite 200, Washington, DC 20002, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: James A. Lewis, National Indian Gaming Commission; Telephone: (202) 632-7003.

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments providing the factual basis behind supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal.

II. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (NIGC or Commission) and sets out a comprehensive framework for the regulation of gaming on Indian lands.

On January 31, 2012, the Commission published a notice of proposed rulemaking to promulgate part 518, the procedures controlling self-regulation. 77 FR 4714 (Jan. 31, 2012). Once promulgated, part 518 established the procedures for the Commission and the OSR to, among other things, receive, evaluate, recommend, issue, deny, or revoke a certificate of self-regulation.

On September 1, 2013, after initial publication, the Commission enacted minor revisions to part 518 to amend certain timelines and an incorrect section heading and reference to IGRA. 78 FR 37114 (Sept. 1, 2013).

III. Development of the Proposed Rule

On June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on several topics, including proposed changes to the procedures controlling self-regulation. Prior to consultation, the Commission released proposed discussion drafts of the regulations for review. The proposed amendments to the procedures controlling self-regulation are intended to improve the Agency's efficiency in evaluating petitions for self-regulation, reduce the time it takes to obtain a certificate of self-regulation and clarify the Office of Self-Regulation's functions. The Commission held two virtual consultation sessions in September and one virtual consultation in October of 2021 to receive tribal input on any proposed changes.

The Commission reviewed all comments received through consultation and now proposes these changes, which it believes will improve the procedures for self-regulation.

IV. Regulatory Matters

Regulatory Flexibility Act

The proposed rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of \$100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions. Nor will the proposed rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of section 3(a) and 3(b)(2) of the order.

National Environmental Policy Act

The Commission has determined that the proposed rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 3141–0003.

Tribal Consultation

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy published July 15, 2013. The NIGC’s consultation policy specifies that it will consult with tribes on Commission Action with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy,

guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to the ability of an Indian tribe to regulate its Indian gaming; an Indian tribe's formal relationship with the Commission; or the consideration of the Commission's trust responsibilities to Indian tribes.

Pursuant to this policy, on June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation to the public, announcing the Agency intended to consult on several topics, including proposed changes to the procedures for self-regulation. The Commission held two virtual consultation sessions in September and one virtual consultation session in October of 2021 to receive tribal input on proposed changes.

List of Subjects in 25 CFR Part 518

Gambling, Indian--lands, Indian--tribal government, Reporting and recordkeeping requirements.

Therefore, for reasons stated in the preamble, 25 CFR part 518 is proposed to be amended as follows:

PART 518 – SELF-REGULATION OF CLASS II GAMING

1. The authority citation for part 518 is amended to read as follows:

Authority: 25 U.S.C. 2706(b)(10); 25 U.S.C. 2710(c)

2. Revise §§ 518.1 through 518.7 to read as follows:

Sec.

518.1 What does this part cover?

518.2 Who will administer the self-regulation program for the Commission?

518.3 Who is eligible to petition for a certificate of self-regulation?

518.4 What must a tribe submit to the Commission as part of its petition?

518.5 What criteria must a tribe meet to receive a certificate of self-regulation?

518.6 What are the responsibilities of the Office of Self-Regulation in the certification process?

518.7 What process will the Commission use to review and certify petitions?

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§ 518.1 What does this part cover?

This part sets forth requirements for obtaining a certificate of self-regulation of Class II gaming operations under 25 U.S.C. 2710(c). When the Commission issues a certificate of self-regulation, the certificate is issued to the tribe, not to a particular gaming operation. The certificate applies to all Class II gaming activity conducted by the tribe holding the certificate.

§ 518.2 Who will administer the self-regulation program for the Commission?

The self-regulation program will be administered by the Office of Self-Regulation. The Chair shall appoint a Director to administer the Office of Self-Regulation.

§ 518.3 Who is eligible to petition for a certificate of self-regulation?

A tribe is eligible to petition the Commission for a certificate of self-regulation of Class II gaming if, for a three (3)-year period immediately preceding the date of its petition:

- (a) The tribe has continuously conducted such gaming;
- (b) All gaming that the tribe has engaged in, or has licensed and regulated, on Indian lands within the tribe's jurisdiction, is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), in accordance with 25 U.S.C. 2710(b)(1)(A);
- (c) The governing body of the tribe has adopted an ordinance or resolution that the Chair has approved, in accordance with 25 U.S.C. 2710(b)(1)(B);
- (d) The tribe has otherwise complied with the provisions of 25 U.S.C. 2710; and

(e) The gaming operation and the tribal regulatory body have, for the three (3) years immediately preceding the date of the petition, maintained all records required to support the petition for self-regulation.

§ 518.4 What must a tribe submit to the Commission as part of its petition?

A petition for a certificate of self-regulation is complete under this part when it contains:

(a) Two copies on 8 1/2" × 11" paper of a petition for self-regulation approved by the governing body of the tribe and certified as authentic by an authorized tribal official;

(b) A description of how the tribe meets the eligibility criteria in § 518.3, which may include supporting documentation; and

(c) The following information with supporting documentation:

(1) A brief history of each gaming operation(s), including the opening dates and periods of voluntary or involuntary closure;

(2) An organizational chart of the tribal regulatory body;

(3) A brief description of the criteria tribal regulators must meet before being eligible for employment as a tribal regulator;

(4) A brief description of the process by which the tribal regulatory body is funded, and the funding level for the three years immediately preceding the date of the petition;

(5) A list of the current regulators and employees of the tribal regulatory body, their complete resumes, their titles, the dates they began employment, and, if serving limited terms, the expiration date of such terms;

(6) A brief description of the accounting system(s) at the gaming operation which tracks the flow of the gaming revenues;

(7) A list of gaming activity internal controls at the gaming operation(s);

(8) A description of the record keeping system(s) for all investigations, enforcement actions, and prosecutions of violations of the tribal gaming ordinance or regulations, for the three (3)-year period immediately preceding the date of the petition; and

(9) The tribe's current set of gaming regulations, if not included in the approved tribal gaming ordinance.

§ 518.5 What criteria must a tribe meet to receive a certificate of self-regulation?

(a) The Commission shall issue a certificate of self-regulation if it determines that for a three (3)-year period, the tribe has:

(1) Conducted its gaming activity in a manner that:

(i) Has resulted in an effective and honest accounting of all revenues;

(ii) Has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) Has been generally free of evidence of criminal or dishonest activity;

(2) Conducted its gaming operation on a fiscally and economically sound basis;

(3) Conducted its gaming activity in compliance with the Indian Gaming Regulatory Act (IGRA), Commission regulations in this chapter, and the tribe's gaming ordinance and gaming regulations; and

(4) Adopted and is implementing adequate systems for:

- (i) Accounting of all revenues from the gaming activity;
- (ii) Investigating, licensing and monitoring of all employees of the gaming activity;
- (iii) Investigating, enforcing, prosecuting, or referring for prosecution violations of its gaming ordinance and regulations; and
- (iv) Prosecuting criminal or dishonest activity or referring such activity for prosecution.

(b) A tribe may illustrate that it has met the criteria listed in paragraph (a) of this section by addressing factors such as those listed in paragraphs (b)(1) through (9) of this section. The list of factors is not all-inclusive; other factors not listed here may also be addressed and considered.

(1) The tribe adopted and is implementing minimum internal control standards which are at least as stringent as those promulgated by the Commission;

(2) The tribe requires tribal gaming regulators to meet the same suitability requirements as those required for key employees and primary management officials of the gaming operation(s);

(3) The tribe's gaming operation utilizes an adequate system for accounting of all gaming revenues from Class II gaming activity;

(4) The tribe has a dispute resolution process for gaming operation customers and has taken steps to ensure that the process is adequately implemented;

(5) The tribe has a gaming regulatory body which:

- (i) Monitors gaming activities to ensure compliance with Federal and tribal laws and regulations;

- (ii) Monitors the gaming revenues accounting system for continued effectiveness;
- (iii) Performs routine operational or other audits of the Class II gaming activities;
- (iv) Routinely receives and reviews gaming revenue accounting information from the gaming operation(s);
- (v) Has access to, and may inspect, examine, photocopy and audit, all papers, books, and records of the gaming operation(s) and Class II gaming activities;
- (vi) Monitors compliance with minimum internal control standards for the gaming operation;
- (vii) Has adopted and is implementing an adequate system for investigating, licensing, and monitoring of all employees of the gaming activity;
- (viii) Maintains records on licensees and on persons denied licenses, including persons otherwise prohibited from engaging in gaming activities within the tribe's jurisdiction;
- (ix) Establishes standards for, and issues, vendor licenses or permits to persons or entities who deal with the gaming operation, such as manufacturers and suppliers of services, equipment and supplies;
- (x) Establishes or approves the rules governing Class II games, and requires their posting;
- (xi) Has adopted and is implementing an adequate system for the investigation of possible violations of the tribal gaming ordinance and regulations, and takes appropriate enforcement actions; and

(xii) Takes testimony and conducts hearings on regulatory matters, including matters related to the revocation of primary management officials, key employee and vendor licenses;

(6) The tribe allocates and appropriates a sufficient source of permanent and stable funding for the tribal regulatory body;

(7) The tribe has adopted and is implementing a conflict of interest policy for the regulators/regulatory body and their staff;

(8) The tribe has adopted and is implementing a system for adequate prosecution of violations of the tribal gaming ordinance and regulations or referrals for prosecution; and

(9) The tribe demonstrates that the operation is being conducted in a manner which adequately protects the environment and the public health and safety.

(c) The tribe assists the Commission with access and information-gathering responsibilities during the certification process.

(d) The burden of establishing self-regulation is upon the tribe filing the petition.

§ 518.6 What are the responsibilities of the Office of Self-Regulation in the certification process?

The Office of Self-Regulation shall be responsible for directing and coordinating the certification process. It shall provide a written report and recommendation to the Commission as to whether a certificate of self-regulation should be issued or denied, and a copy of the report and recommendation to the petitioning tribe.

§ 518.7 What process will the Commission use to review and certify petitions?

(a) Petitions for self-regulation shall be submitted by tribes to the Office of Self-Regulation.

(1) Within 30 days of receipt of a tribe's petition, the Office of Self-Regulation shall conduct a review of the tribe's petition to determine whether it is complete under § 518.4.

(2) If the tribe's petition is incomplete, the Office of Self-Regulation shall notify the tribe by letter, certified mail or return receipt requested, of any obvious deficiencies or significant omissions in the petition. A tribe with an incomplete petition may submit additional information and/or clarification within 30 days of receipt of notice of an incomplete petition.

(3) If the tribe's petition is complete, the Office of Self-Regulation shall notify the tribe in writing.

(b) Once a tribe's petition is complete, the Office of Self-Regulation shall conduct a review to determine whether the tribe meets the eligibility criteria in § 518.3 and the approval criteria in § 518.5. During its review, the Office of Self-Regulation:

(1) May request from the tribe any additional material it deems necessary to assess whether the tribe has met the criteria for self-regulation.

(2) Will coordinate an on-site review and verification of the information submitted by the petitioning tribe.

(c) Within 120 days of notice of a complete petition under § 518.4, the Office of Self-Regulation shall provide a recommendation and written report to the full Commission and the petitioning tribe.

(1) If the Office of Self-Regulation determines that the tribe has satisfied the criteria for a certificate of self-regulation, it shall recommend to the Commission that a certificate be issued to the tribe.

(2) If the Office of Self-Regulation determines that the tribe has not met the criteria for a certificate of self-regulation, it shall recommend to the Commission that it not issue a certificate to the tribe.

(3) The Office of Self-Regulation shall make all information, on which it relies in making its recommendation and report, available to the tribe, subject to the confidentiality requirements in 25 U.S.C. 2716(a), and shall afford the tribe an opportunity to respond.

(4) The report shall include:

(i) Findings as to whether each of the eligibility criteria is met, and a summary of the basis for each finding;

(ii) Findings as to whether each of the approval criteria is met, and a summary of the basis for each finding;

(iii) A recommendation to the Commission as to whether it should issue the tribe a certificate of self-regulation; and

(iv) A list of any documents and other information received in support of the tribe's petition.

(5) A tribe shall have 30 days from the date of issuance of the report to submit to the Office of Self-Regulation a response to the report.

(d) After receiving the Office of Self-Regulation's recommendation and report, and a tribe's response to the report, the Commission shall issue preliminary findings as to whether the eligibility and approval criteria are met. The Commission's preliminary findings will be provided to the tribe within 45 days of receipt of the report.

(e) Upon receipt of the Commission's preliminary findings, the tribe can request, in writing, a hearing before the Commission, as set forth in § 518.8. Hearing requests shall be made

to the Office of Self-Regulation and shall specify the issues to be addressed by the tribe at the hearing and any proposed oral or written testimony the tribe wishes to present.

(f) The Commission shall issue a final determination within 30 days after issuance of its preliminary findings if the tribe has informed the Commission in writing that the tribe does not request a hearing or within 30 days after the conclusion of a hearing, if one is held. The decision of the Commission to approve or deny a petition shall be a final agency action.

(g) A tribe may withdraw its petition and resubmit it at any time prior to the issuance of the Commission's final determination.

3. Revise § 518.11 to read as follows:

§ 518.11 Does a tribe that holds a certificate of self-regulation have a continuing duty to advise the Commission of any additional information?

Yes. A tribe that holds a certificate of self-regulation has a continuing duty to advise the Office of Self-Regulation within ten business days of any changes in circumstances that are material to the approval criteria in § 518.5 and may reasonably cause the Commission to review and revoke the tribe's certificate of self-regulation. Failure to do so is grounds for revocation of a certificate of self-regulation.

4. Revise §§ 518.13 and 518.14 to read as follows:

§ 518.13 When may the Commission revoke a certificate of self-regulation?

If the Office of Self-Regulation determines that the tribe no longer meets or did not comply with the eligibility criteria of § 518.3, the approval criteria of § 518.5, the requirements of § 518.10, or the requirements of § 518.11, the Office of Self-Regulation shall prepare a written recommendation to the Commission and deliver a copy of the recommendation to the tribe. The Office of Self-Regulation's recommendation shall state the reasons for the recommendation and shall advise the tribe of its right to a hearing under part 584 of this chapter

or right to appeal under part 585 of this chapter. The Commission may, after an opportunity for a hearing, revoke a certificate of self-regulation by a majority vote of its members if it determines that the tribe no longer meets or did not comply with the eligibility criteria of § 518.3, the approval criteria of § 518.5, the requirements of § 518.10, or the requirements of § 518.11.

§ 518.14 May a tribe request a hearing on the Commission's proposal to revoke its certificate of self-regulation?

Yes. A tribe may request a hearing regarding the Office of Self-Regulation's recommendation that the Commission revoke a certificate of self-regulation. Such a request shall be filed with the Commission pursuant to part 584 of this chapter. Failure to request a hearing within the time provided by part 584 of this chapter shall constitute a waiver of the right to a hearing. At any hearing where the Commission considers revoking a certificate, the Office of Self-Regulation bears the burden of proof to support its recommendation by a preponderance of the evidence. The decision to revoke a certificate is a final agency action and is appealable to Federal District Court pursuant to 25 U.S.C. 2714.

Date: March 24, 2022.

E. Sequoyah Simermeyer,
Chairman.

Jeannie Hovland,
Vice Chair.

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